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No. 88-1095

(2)

In The

Supreme Court of the United States

October Term, 1988

JOSEPH HOWE and DORIS LOUISE HOWE,

Appellants,

vs.

NORCHEK OF NEWPORT, INC.
d/b/a WOODY'S WHARF; ROBERT KINNEY,

Appellees.

APPEAL FROM
THE COURT OF APPEAL OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION THREE

MOTION TO AFFIRM OR DISMISS

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JOSEPH HOWE and DORIS LOUISE HOWE,

Appellants,

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NORCHEK OF NEWPORT, INC. d/b/a WOODY'S WHARF; ROBERT KINNEY,

Appellees.

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA FOURTH APPELLATE DISTRICT, DIVISION THREE

MOTION TO AFFIRM OR DISMISS

Appellees Norchek of Newport, Inc. d/b/a Woody's Wharf and Robert Kinney move for summary affirmance of the judgment of the Court of Appeal of California, which held that California Business and Professions Code sections 25602 and 25602.1 and California Civil Code section 1714(b) do not violate appellants' rights to equal protection and due process under the Fifth and Fourteenth Amendments to the United States Constitution. Alternatively, appellees move for dismissal of this appeal on the ground it does not present a substantial federal question.

STATEMENT OF THE CASE[1]

Appellees are servers of alcoholic beverages. They allegedly served alcohol to Steven Chase when he was obviously intoxicated. Chase then drove away from appellees' establishment in a pick-up truck. Chase's vehicle struck and killed appellants' 20-year-old son, Joseph, who was riding a bicycle along the road.

Appellants subsequently instituted the present action against appellees and others in the Superior Court of California for the County of Orange. Appellants alleged causes of action against appellees for negligence and willful misconduct. Appellees filed a demurrer to the complaint on the ground that California Business & Professions Code § 25602(b) granted appellees immunity from civil liability for their conduct. The superior court sustained the demurrer and ordered that the complaint be dismissed without leave to amend.

Appellants appealed to the Court of Appeal of California, which affirmed the dismissal of their complaint. The Court of Appeal rejected appellants' contention that California Business and Profession Code sections 25602 and 25602.1 violate the equal protection clause of the Fourteenth Amendment to the United States Constitution, as well as their contention that California Business and Professions Code section 25602(c) and California Civil Code

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[1]This appeal arises from an order dismissing appellants' complaint without leave to amend. Thus, this case has not been tried and appellants have yet to prove the truth of their allegations. The facts recited herein are those alleged by appellants, which appellees assume to be true for purposes of the present motion.

section 1714(b) violate the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Appellants sought review in the Supreme Court of California, which declined to hear the case.

The remaining facts are adequately set forth in appellants' Statement of the Case.

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SUMMARY OF ARGUMENT

Appellants' equal protection arguments merely challenge the wisdom and necessity of run-of-the-mill economic and social legislation. The legislation in question does not employ suspect classifications, nor does it infringe fundamental rights. The legislation is therefore reviewed under the deferential rational basis standard.

The statutes at issue are rational and serve legitimate state interests. Indeed, the California legislature had ample reason to reenact the former common law rule of immunity for providers of alcohol. The more recent court-created rule that providers of alcohol could be liable for injuries inflicted by those who consumed the alcohol violated a widely shared belief that the responsibility for injuries caused by an intoxicated person should be borne by him alone and not shifted to remote third parties. Moreover, the rule of civil liability had given rise to an insurance crisis which threatened to undermine significant segments of the state's economy. Rather than endure the social and economic consequences of the civil liability rule, the legislature concluded that, except in cases of obviously intoxicated minors (who face special risks and require special

protection), the problem of alcohol-related injuries should be addressed through enhanced administrative and criminal sanctions.

Appellants fail to demonstrate that the legislative response to the problem of drunk driving was irrational. They merely argue it would have been fairer and more effective to allow providers of alcohol to be subject to suit in all cases. However, it is not the province of the courts to evaluate the wisdom or desirability of the legislation. Since the legislation at issue is rationally related to legitimate state interests, appellants' equal protection arguments fail to raise a substantial federal question and should be dismissed.

Appellants' due process claim must fail because the legislation at issue does not deprive them of life, liberty, or property. Even if the due process clause were applicable, appellants' argument that the legislation creates an unconstitutional irrebuttable presumption rests on both a gross misreading of the statutes at issue and a fundamental misunderstanding of the irrebuttable presumption doctrine. Contrary to appellants' assertion, the statutes at issue contain no presumptions concerning lack of causation or any other fact. The statutes refer to "proximate causation," which is a matter of law not fact.

In addition, unlike other parties who have successfully invoked the irrebuttable presumption doctrine, appellants do not claim they have been wrongly included in, or excluded from, any statutory class. Nor do appellants identify any presumed facts which, if rebutted, would place them within the class of persons entitled to maintain a civil action against appellees. Appellants argue they should be

given a hearing on the issue of causation. Under the statutes at issue, however, causation is immaterial. Appellants' action is barred regardless of whether appellees' conduct caused injury. The irrebuttable presumption doctrine is therefore inapplicable in this case.

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SUMMARY OF THE PERTINENT LEGISLATION

In a series of statutory enactments in 1978, the California legislature addressed the subject of civil liability of businesses and persons who serve alcoholic beverages. *See* Cal. Bus. & Prof. Code §§ 25602(b), (c), 25602.1-.3 (West 1985); Cal. Civil Code § 1714(b) (West 1985) (hereinafter referred to collectively as the "1978 amendments"). The legislature retained an existing provision making it a misdemeanor to sell or furnish alcoholic beverages to an obviously intoxicated person. *See* Cal. Bus. & Prof. Code § 25602(a) (West 1985). The 1978 amendments provided that one who commits that misdemeanor shall not be civilly liable for the injuries inflicted on any person as a result of the intoxication by the consumer of the beverage. *Id.*, § 25602(b).

The 1978 amendments expressly abrogated a recent line of California Supreme Court decisions upholding civil liability of providers of alcohol, and reinstated the "prior judicial interpretation finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person." *Id.*, § 25602(c) [expressly abrogating *Vesely v. Sager*, 5 Cal.3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971); *Bernhard v. Harrah's Club*, 16 Cal.3d

313, 546 P.2d 719, 128 Cal.Rptr. 215, *cert. denied,* 429 U.S. 859 (1976); and *Coulter v. Superior Court,* 21 Cal.3d 144, 577 P.2d 669, 145 Cal.Rptr. 534 (1978)]; Cal. Civ. Code, § 1714(b) (West 1985) [same]. The legislature retained civil liability only in the narrow class of cases where a licensed seller of alcoholic beverages sells alcohol to an obviously intoxicated *minor* and that sale proximately causes personal injury or death.[2] Cal. Bus. & Prof. Code § 25602.1 (West 1985).

While the 1978 amendments eliminated civil liability in most cases, they strengthened the authority of the Alcoholic Beverage Control Department ("ABC") to punish liquor licensees who violate the statutory proscription against serving alcohol to obviously intoxicated persons. The legislation authorized the Director of ABC to seek injunctive relief to prevent a licensee from continuing to serve obviously intoxicated patrons. The legislation also prohibited a licensee who has a prior violation involving sale to an obviously intoxicated person from petitioning on a subsequent violation for a "compromise" sanction allowing the licensee to pay a fine in lieu of having its license suspended. *Id.*, §§ 25602.2-.3.

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[2]This exception was amended in 1985 to extend liability to both licensed and unlicensed sellers of alcoholic beverages. *See Baker v. Sudo,* 194 Cal.App.3d 936, 944, 240 Cal.Reptr. 38, 43 (1987).

ARGUMENT

I.

APPELLANTS' EQUAL PROTECTION ARGUMENTS FAIL TO RAISE A SUBSTANTIAL FEDERAL QUESTION

A. The 1978 Amendments Should Be Reviewed Under The Deferential "Rational Basis" Standard.

The 1978 amendments abrogated a relatively recent, court-created rule of tort liability. The amendments employ no suspect classification, nor do they infringe on any fundamental rights.[3] Accordingly, this Court should evaluate the 1978 amendments under the deferential rational basis standard. *See Duke Power Co. v. Carolina Env't. Study Group, Inc.*, 438 U.S. 59, 83 (1978) [constitutionality of provision of the Price-Anderson Act limiting liability for injuries caused by nuclear power plant accidents governed by the rational basis test]; *Edelstein v. Wilentz*, 812 F.2d 128 (3d Cir. 1987) [statute granting immunity to persons filing ethics grievances against attorneys subject to rational basis test]; *Morris v. Hotel Riviera, Inc.*, 704 F.2d 1113, 1114 (9th Cir. 1983) [rational basis test applies to statute limiting innkeepers' liability for guests' property losses]; *Sidle v. Majors*, 536 F.2d 1156, 1157 (7th Cir.), *cert. denied*, 429 U.S. 945 (1976) [rational basis test applies to statute immunizing automobile driver from tort liability to nonpaying passenger].

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[3]Appellants halfheartedly suggest that the 1978 amendments "affect a fundamental personal right, the right to life." Appellants' Jurisdictional Statement 13 n.3 (hereinafter "Jur. Stmt."). This suggestion is meritless and barely warrants a response. The 1978 amendments do not affect or infringe any person's right to life. Appellants do not develop the suggestion and, indeed, proceed to analyze the 1978 amendments under the rational basis test.

Under the rational basis standard, the 1978 amendments are entitled to a presumption of constitutionality. *New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976) (per curiam). To pass muster under the equal protection clause, the 1978 amendments need only be rationally related to a legitimate state interest.[4] *Id.* "[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations . . . ; in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." *Id.*

B. The Civil Immunity Granted By California Business And Professions Code Section 25602 And California Civil Code Section 1714(b) Is Rationally Related To Legitimate State Interests.

1. States Have Broad Authority To Limit Tort Remedies And Create Immunities.

Appellants contend the 1978 amendments violate the equal protection clause by "providing to one class of citizens, namely licensed providers of alcohol, a civil immunity for their criminal acts," thereby discriminating against "victims of crime." Jur. Stmt. at i, 24. Although appellants employ emotionally-charged labels, their real

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[4]Appellants incorrectly assert that in evaluating the rational basis for a statute, "the court should look at the actual legislative purposes." Jur. Stmt. at 17. On the contrary, it is well-established that "a legislative classification will not be set aside if *any* state of facts rationally justifying it is demonstrated to or perceived by the courts." *United States v. Maryland Savings-Share Ins. Corp.*, 400 U.S. 4, 6 (1970) (per curiam) (emphasis added); *see also Vanderwater v. Hatch*, 835 F.2d 239, 244 (10th Cir. 1987) [court need not inquire into the actual, subjective motivation of the state legislature].

complaint is simply that the California legislature decided to grant civil immunity to a class of persons who might otherwise be held liable in tort. *See* Jur. Stmt. at 25.

Appellants suggest that the mere "grant [of] an economic preference—immunity—to one group of citizens at the expense of another . . . is constitutionally prohibited." Jur. Stmt. at 26. Appellants are plainly wrong. A state may create civil immunities and bar tort remedies as long as it has a rational reason for doing so. As this Court has explained, "[t]he 'Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object,' [citations], despite the fact that 'otherwise settled expectations' may be upset thereby. [Citations.] Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts. [Citations.]" *Duke Power Co.*, 438 U.S. at 88 n.32. Numerous cases have affirmed the constitutionality of statutory tort immunities, including the very immunity at issue here, notwithstanding tort "victims" were thereby denied a right of action. *See Vanderwater v. Hatch*, 835 F.2d 239 (10th Cir. 1987); *International Adm'rs, Inc. v. Life Ins. Co. of N. America*, 753 F.2d 1373, 1380 (7th Cir. 1985); *Simpson v. United States*, 652 F.2d 831 (9th Cir. 1981); *Corey v. Jones*, 650 F.2d 803 (5th Cir. 1981); *Cory v. Shierloh*, 29 Cal.3d 430, 439, 629 P.2d 8, 174 Cal. Rptr. 500 (1981).

Appellants argue the state cannot immunize from civil liability conduct that could give rise to criminal liability. Appellants cite no authority, and we have found none, to support their novel proposition. Despite appellants' pro-

testations that "[e]very victim should have the right to sue the criminal that caused his injury" Jur. Stmt. at 26, the commission of a crime does not necessarily generate a right to sue in tort. A party's right to seek tort damages derives from common law principles of duty and liability which, as this Court has held, may be abrogated by the legislature to serve other legitimate state interests.

2. The California Legislature Had Numerous Legitimate Reasons For Granting Civil Immunity To Sellers Of Alcohol.

The legislative history of the 1978 amendments establish that the legislature had ample reasons for enacting a general rule of tort immunity. The policy considerations which influenced the legislature included the following:

1. First, the legislature concluded that as a matter of social policy an adult can and should be responsible for his own consumption of alcohol and that responsibility for injuries caused by an intoxicated person should be borne by him alone and not shifted to third parties.[5] *Cory v. Shierloh*, 29 Cal.3d at 439-40, 629 P.2d at 13, 174 Cal.Rptr. at 505; *see also* Note, *Liability of Liquor Suppliers in California: A Return to the Common Law*, 12 U.C. Davis

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[5]Significantly, while the legislature conferred immunity on those who serve alcoholic beverages, it did not leave the victim of drunk driving without a remedy. A person injured by a drunk driver can obtain full compensation by filing a tort action against the intoxicated person. If the intoxicated driver is not insured, the injured party can still receive payment from his own uninsured motorist insurance coverage, which is mandatory in California. Cal. Ins. Code § 11580.2 (West Supp. 1989). If the injured party also has no insurance, he may claim benefits under the Victims of Violent Crimes Act, California Government Code sections 13959-13969.2.

L.Rev. 191, 202 (1979) (hereinafter "*Liability of Suppliers*").

This central purpose of the legislation was identified by its proponent, Senator Ruben S. Ayala, when he introduced the bill. Senator Ayala explained: "I believe that every person is responsible for his or her willful acts and for any injury occasioned to another by his or her want of ordinary care or skill." Senate Committee on Judiciary, Background Information and Accompanying Press Release [Appendix at A-3].[6] This sentiment was echoed by the California Democratic Party in a resolution supporting the elimination of third-party liquor liability. The Party declared: "[T]hose who abuse the use of alcohol should be responsible for their own intoxicated behavior, and . . . the drinker of alcoholic beverages, not the furnisher thereof, should be liable for negligent acts arising out of his abuse of alcohol." Letter from United Spirits Association to Senator Ayala (quoting California Democratic Party resolution) (April 7, 1978) [Appendix at A-15]; *accord* Letter from the California State University and Colleges Student Presidents Association to Governor Edmund G. Brown, Jr. (August 28, 1978) [Appendix at A-19] ["the current liability laws . . . make third parties unreasonably liable for another person's mistake"]; Letter from the California Conference Board Amalgamated Transit Union Division Locals to Governor

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[6]This Court may take judicial notice of documents reflecting a statute's legislative history. *Territory of Alaska v. American Can Co.*, 358 U.S. 224, 226-27 (1959); *see also Korematsu v. United States*, 584 F.Supp. 1406, 1414 (N.D. Cal. 1984). For the Court's convenience, such documents referred to herein are set forth in the attached appendix.

Brown (September 12, 1978) [Appendix at A-21] ["It is simply not equitable to permit the erosion of well-established liability principles simply for the sake of finding solvent defendants"].[7]

The legislature also could take note of the fact that imposing liability on those who serve alcohol would have a "chilling effect" on the service of alcohol in all contexts, thereby unfairly reducing the enjoyment of responsible consumers at social functions in both private homes and commercial establishments. *See Brown v. Merlo,* 8 Cal.3d 855, 872 n.12, 506 P.2d 212, 224, 106 Cal.Rptr. 388, 400 (1973) ["the promotion of hospitality is clearly a permissible and worthwhile goal"].

2. The second factor which influenced the legislature was the detrimental effect of the new, third-party liability rule on important local industries, including restaurants and bars, hotels and motels, bowling alleys, liquor distributors and retailers, social clubs and other associations that sponsor social events. After the courts announced the new liability rule, insurance rates skyrocketed. In many

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[7]The broad support for the 1978 amendments among groups representing a wide spectrum of public views is compelling evidence the legislation was rationally related to accepted public values and priorities. Among the groups expressing support were California State University and Colleges Student Presidents Association, San Pedro Chamber of Community Development and Commerce, Bowling Properties Association of California, Veterans of Foreign Wars, Native Sons of the Golden West, American Legion, Moose Club, United Spirits Association, California Conference Board Amalgamated Transit Union Division Locals, and California Chamber of Commerce. See Senate Democratic Caucus, Analysis of S.B. 1645 (As Amended 5-17-78) [Appendix at A-4 to A-5]; individual letters from proponents [Appendix at A-20, A-23].

cases, adequate insurance became unavailable.[8] *Liability of Suppliers, supra,* 12 U.C. Davis L.Rev. at 202 n. 69-71; Analysis of Senate Bill 1645 by Senate Committee on Judiciary [Appendix at A-9] [referring to rising insurance costs and noting that, according to one proponent, premiums for tavern owners increased from $35,000 to $160,000 per year]; Analysis by Assembly Office of Research (May 17, 1978) [Appendix at A-13] [same]; Letter from the California Chamber of Commerce to Governor Brown (August 31, 1978) [Appendix at A-23] [stating liability insurance premiums increased 400% and more for its members]; *Kindt v. Kaufman,* 57 Cal.App.3d 845, 874 n. 11, 129 Cal.Rptr. 603, 622 (1976), *disapproved on other grounds, Ewing v. Cloverleaf Bowl,* 20 Cal.3d 289, 572 P.2d 1155, 143 Cal.Rptr. 13 (1978) [referring to newspaper reports of vastly increased premiums].

This insurance crisis threatened the well-being of significant segments of the state economy. Many businesses, especially small- and medium-sized ones, were forced either to go out of business or to carry no insurance at all because they could not afford the increased premiums. See Letter from United Spirits Association to Senator

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[8]One of the reasons for the huge increase in insurance premiums was the fact that third-party suits not only carried tremendous exposure, they were practically indefensible. Bars, restaurants and hotels inevitably would be sued in almost every case involving an alcohol related injury since the provider of alcohol, if insured, typically carried more insurance than the individual intoxicated driver. However, since the alcohol provider might not be notified of the suit until long after the underlying accident, the provider would have no way to prove that it had not served the driver or that the driver was not obviously intoxicated. *See* Letter from United Spirits Association to Senator Ayala, *supra* [Appendix at A-17].

Ayala, *supra* [Appendix at A-17] [stating that most liquor licensees were not buying insurance due to the prohibitive cost]; Letter from Insurance Agents and Brokers Legislative Counsel to Governor Brown (September 13, 1978) [Appendix at A-25 to A-26] [regarding effect of insurance crisis on small businesses]; Letter from Cal. Licensed Beverage Ass'n to Governor Brown (August 31, 1978) [Appendix at A-27] [same]. Ironically, by driving the cost of insurance to prohibitive levels, the court's new liability rule actually undermined the goal of providing greater compensation to injured parties. Liquor licensees operating without insurance would be unable to pay for a plaintiff's damages. Thus, the only effect of a large judgment in favor of an injured person would be to force the liquor licensee out of business.

The 1978 amendments represented a rational legislative response to these threats and a legitimate attempt to protect the state's economy. This Court has recognized the legislative power to enact legislation designed to protect the economic viability of important business enterprises. In *Duke Power Co.*, 438 U.S. at 93-94, this Court upheld legislation designed to encourage the development of the atomic energy industry by limiting liability for nuclear accidents. This Court stated that the goal of protecting that industry was "ample justification for the difference in treatment between those injured in nuclear accidents and those whose injuries are derived from other causes." *Id.*; *see Morris v. Hotel Riviera, Inc.*, 704 F.2d at 1114 [legislative purpose of protecting and enhancing state's important tourism industry justified statute limiting hotels' liability for property loss]; *International Adm'rs, Inc. v. Life*

Ins. Co. of N. America, 753 F.2d at 1380 [statute providing immunity to insurance companies for statements made in cancellation notices did not violate equal protection simply because it was enacted to create a special benefit for the insurance industry]; *Fein v. Permanente Medical Group*, 38 Cal.3d 137, 157-62, 695 P.2d 665, 678-82, 211 Cal.Rptr. 368, 382-85 (1985) [statutory limitation on damages recoverable for medical malpractice ensured health care providers affordable insurance and was thus rationally related to legitimate state interest in maintaining health care industry]. As in the foregoing cases, the threat to California businesses posed by the third-party liability rule provided a legitimate and rational reason to adopt a rule of dram shop immunity.

3. Finally, the legislature reasonably concluded that imposition of criminal and administrative penalties, rather than civil liability, would effectively ensure that alcohol would not be served to intoxicated persons. *See* Letter from United Spirits Association to Senator Ayala, *supra* [Appendix at A-15 to A-16]. While it is conceivable the threat of civil liability might have further deterred the service of alcohol to obviously intoxicated patrons, the Constitution does not require that every conceivable means of attacking a perceived social problem be enacted into law. *See Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 610 (1935). The California legislature acted well within its province in concluding that the additional deterrent value of civil liability was insufficient to justify the resulting social and economic costs.

In sum, the legislature's decision to confer civil immunity on providers of alcohol rested on a rational social and economic basis. Appellants' equal protection challenge to the 1978 amendments is without merit.

C. California Business And Professions Code Section 25602.1, Which Allows Suit Against Persons Who Serve Obviously Intoxicated Minors, Embodies A Rational Exception To The General Rule Of Immunity.

1. Appellants Mischaracterize The Effect Of Section 25602.1. It Does Not Discriminate Between "Innocent" And "Criminal" Minors.

Appellants contend that the 1978 amendments violate the equal protection clause of the Fourteenth Amendment by discriminating against "innocent" minors and in favor of "criminal" minors, i.e., minors who consume alcohol. Jur. Stmt. at i, 12. Appellants simply mischaracterize the legislation. California Business and Professions Code section 25602.1 provides that, notwithstanding the general rule of immunity established in section 25602(b), "a cause of action may be brought by or on behalf of *any* person who has suffered injury or death" against a person who sells alcoholic beverages to an obviously intoxicated minor, where the sale of the beverage to the minor is the proximate cause of the personal injury or death. Cal. Bus. & Prof. Code § 25602.1 (West 1985) (emphasis added). The injured person has a cause of action whether he is "innocent" or "criminal," minor or adult.[9]

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[9]Even if appellants were correct that the legislation discriminates against "innocent minors," they would have no standing to mount a challenge under the equal protection clause. As a general rule, a person has no standing to assert the constitutional claims of third parties who are not before the court. *See Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976); *United States v. Raines*, 362 U.S. 17, 21 (1960). Appellants have no standing to assert the rights of minors, innocent or otherwise, because neither they nor their son, who was 20 years old when he died.

(Continued on following page)

The statute does not distinguish between classes of potential plaintiffs but between classes of potential *defendants*. Those who serve alcohol to obviously intoxicated adults are civilly immune, while those who serve alcohol to obviously intoxicated minors may be liable. Appellants' only complaint is that the legislature did not go far enough, that it should have imposed liability on both groups of servers. As we next show, the legislature's decision to grant immunity to one class of potential defendants but not another does not violate the equal protection clause because there was a rational basis for the decision.

2. The "Minors" Exception Was A Rational Means Of Reconciling The Competing Goals Of Protecting Minors, Promoting Public Safety, And Ensuring The Economic Viability Of Servers Of Alcoholic Beverages.

As discussed above, one reason the California legislature enacted the general rule of immunity codified in California Business and Professions Code section 25602 and California Civil Code section 1714(b) was the legislature's conclusion that administrative and criminal sanctions were sufficient to deter the sale of liquor to intoxi-

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(Continued from previous page)

fall within that class. *See* Cal. Civ. Code § 25 (West 1985) ("Minors are all persons under 18 years of age"). In any event, appellants do not purport to represent their son's interests in this action. The causes of action alleged against appellees are appellants' own claims for negligence and willful misconduct.

Appellants' lack of standing to assert the rights of "innocent" minors is demonstrated by the fact that if this Court requires California to afford such minors a cause of action against providers of alcohol, appellants will not benefit in the least. As adults, their suit will still be barred.

cated persons and that, accordingly, the burdens and costs of imposing civil liability as an additional deterrent were unjustified.

The legislature balanced the benefits and burdens differently in cases where alcohol is served to an obviously intoxicated *minor*. In that situation, the legislature reasonably determined that an added deterrent, in the form of civil liability, was justified because the consumption of alcohol by an intoxicated minor is a significantly greater social evil.

The brief submitted by amicus curiae Mothers Against Drunk Driving ("MADD") validates the legislative judgment. According to MADD, "[t]he toll [of drunk driving] is heaviest upon the young: Traffic crashes are the number one cause of death and serious injury for those under twenty-five years of age; young people constitute approximately thirty-eight percent of the total 23,630 annual drunk driving deaths. . . . Nine teenagers die, and hundreds of others are injured, every day due to drunk driving." Amicus Curiae Brief by Mothers Against Drunk Driving 5-6. The equal protection clause does not require a state "to strike at all evils at the same time or in the same way." *Semler v. Oregon State Bd. of Dental Examiners,* 294 U.S. at 610. In light of the special dangers posed by intoxicated young persons, it was rational for the legislature to impose greater liability on those who serve alcohol to intoxicated minors than on those who provide alcohol to adults.

The minors exception is justifiable on another ground, as well. The common law rule of immunity codified in the 1978 legislation presumes an adult consumer can drink

responsibly. Thus, it is his consumption of alcohol, rather than the service of alcohol to him, which is deemed the cause of resulting injuries. *See* Cal. Bus. & Prof. Code § 25602(c) (West 1985); Cal. Civil Code § 1714(b) (West 1985). In contrast, our society presumes that minors are *not* competent to appreciate and deal with the detrimental effects of alcoholic beverages. For this very reason, California law makes it a misdemeanor to sell, furnish or give alcoholic beverages to a person under the age of 21. Cal. Bus. & Prof. Code § 25658 (West 1985); *Brockett v. Kitchen Boyd Motor Co.*, 24 Cal.App.3d 87, 93, 100 Cal. Rptr. 752, 756 (1972) [section 25658 was enacted because "presumably the legislative body believed that most minors are neither physically nor mentally equipped to handle the consumption of intoxicating liquor"].

In light of the limited capacity of minors to consume alcohol responsibly, the service of alcohol to the minor becomes a more significant factor in the causation of any resulting injuries. Thus, the legislature could reasonably require adults to assume responsibility for and exercise control over a minor's consumption of alcohol and could reasonably impose civil liability on irresponsible adults who fail to do so. As the California Supreme Court has explained:

> [T]he Legislature might reasonably have deemed [minors] more in need of safeguarding from intoxication than adults, because of the comparative inexperience of minors in both drinking and driving. Given society's solicitous concern with minors . . ., the Legislature perhaps might reasonably suspend the sole theory otherwise advanced in justification of the subject legislation, namely, that it is the consumption alone, not the furnishing, of liquor which causes the resultant deaths and injuries.

Cory v. Shierloh, 29 Cal.3d at 441, 629 P.2d at 14, 174 Cal.Rptr. at 506.

Despite the obvious rational basis for the minors exception, appellants contend section 25602.1 is irrational because it does not protect "innocent" minors but only "criminal" ones. To the contrary, the rights of an intoxicated ("criminal") minor are no greater than those of a nonintoxicated ("innocent") minor since in every case where the former could recover so could the latter. For example, if an intoxicated minor injures a nonintoxicated minor, *both* would have a cause of action under section 25602.1 against the negligent provider of the alcohol.

Appellants also contend that section 25602.1 is irrational because it was enacted for "the protection of people under twenty-one" yet would deny their 20-year-old son a cause of action. Jur. Stmt. at 18. Appellants misstate the legislative purpose. Section 25602.1 was not designed to protect young people generally but specifically *to deter the service of alcohol to minors.* Toward this end, the legislature authorized civil suits, by adults and minors alike, against persons who serve alcohol to obviously intoxicated minors. To permit civil suits against persons who serve *adults* (as appellees did here) would in no way further the legislative goal of preventing service to minors.

Finally, appellants suggest section 25602.1 is irrational because a statute imposing liability on the provider of alcohol in all cases, rather than only in cases where alcohol is served to an obviously intoxicated minor, would be *fairer* and would have the salutary effect of reducing *more* alcohol-related injuries. Appellants' argument should be addressed to the legislature, not to the courts. "[I]t is

up to legislatures, not courts, to decide on the wisdom and utility of legislation." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 469 (1981).

D. Statutes Containing Limitations On Dram Shop Liability Similar To Those Challenged Here Have Consistently Withstood Attack Under The Equal Protection Clause. There Is No Split Of Authority Among The States Requiring Resolution By This Court.

There appears to be no dispute among the states regarding the constitutionality of liability limitations similar to those at issue here. The courts agree such limitations are constitutional. We know of no case where a dram shop act which conditioned a plaintiff's ability to bring suit on the identity of either the intoxicated person or the plaintiff was held to violate the equal protection clause. To the contrary, the courts have uniformly concluded that statutes such as California's satisfy the rational basis test.

For example, in *Barnes v. B.K. Credit Serv., Inc.*, 461 So.2d 217 (Fla.App.1984), the Florida Court of Appeal upheld a statute which codified the traditional common law rule of immunity but created an exception where liquor was served to a minor or a person habitually addicted to alcohol. The court explained the statute was rational because the legislature "was doubtless furthering the ultimate legitimate interest of safeguarding from harm one of immaturity imbibing intoxicants. . . . Whether it would have been wiser for the legislature to also include under its protection obviously intoxicated adults is not an issue we may resolve." *Id.* at 219-20.

In *Roy v. Rau Tavern, Inc.*, 167 Mich.App. 664, 423 N.W.2d 54 (1988), the Michigan Court of Appeal upheld

a statute which prevented the family of an intoxicated person from bringing suit for loss of support or companionship while permitting such a suit by the parents of a person harmed by an intoxicated person. The court rejected the plaintiffs' equal protection challenge, reasoning that "[t]he amendment was designed to deal with the numerous cases which were creating a liability crisis for tavern and restaurant owners. Barring family members of a visibly intoxicated person from maintaining suit was one way in which this crisis could be lessened." *Id.* at 668, 423 N.W.2d at 57; *accord Glinka v. The Flame Of The Countryside, Inc.*, 171 Ill.App.3d 81, 524 N.E.2d 1102 (1988); *see also Simpson v. Kilcher*, 749 S.W.2d 386, 392 (Mo. 1988) [upholding statute permitting liability only if liquor licensee is *convicted* of selling alcohol to minor or obviously intoxicated person; the legislature was entitled to make "a policy decision to place responsibility for these accidents on the drunk driver" and to confine liability "to those cases where conduct is so flagrant it becomes objectively provable by criminal conviction," thereby preventing lawsuits every time a tavern patron causes injury]; *cf. Linnabery v. DePauw*, 695 F.Supp. 411 (C.D. Ill. 1988) [limitation of Illinois dram shop act to accidents occurring within the state is constitutional].

These courts, like the California Supreme Court, recognized that the legislature may limit the class of persons who may bring suit as long as there is a rational basis for the limitation. The legal principles governing such cases are well established and need no further explication by this Court. Appellants' equal protection claims fail to raise a substantial federal question, and their appeal should be summarily dismissed.

II.

APPELLANTS' DUE PROCESS CLAIM FAILS TO RAISE A SUBSTANTIAL FEDERAL QUESTION

Appellants claim California Business and Professions Code section 25602(c) and Civil Code section 1714(b) violate the due process clauses of the Fifth and Fourteenth Amendments. They invoke the moribund "irrebuttable presumption" doctrine. *See* Jur. Stmt. at 31-38. According to appellants, the statutes in question "conclusively presume that service of alcohol cannot cause subsequent injuries to third parties." *Id.* at 32. Since the so-called presumption is not "universally true," appellants argue, they must be afforded an opportunity to litigate the issue of causation. *Id.* at 33, 35-36.

Appellants' argument borders on the frivolous. They misapply both the due process clause and the irrebuttable presumption doctrine. Moreover, they misread the legislation in question, which presumes nothing about "causation" or about any other fact. Appellants' due process claim, therefore, does not merit attention by this Court.

A. The Due Process Clause Is Inapplicable Because The 1978 Amendments Do Not Deprive Appellants Of "Life, Liberty, Or Property."

The due process clause of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const., amend. XIV. Where a legislative enactment works no deprivation of "life, liberty, or property," the enactment cannot violate the due process clause. *See Board of Regents v. Roth,* 408 U.S. 564, 569-70 (1972); *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972).

A person has no property interest in a tort claim for damages under state common law. *Duke Power Co.,* 438 U.S. at 88 n. 32 ["Our cases have clearly established that

'[a] person has no property, no vested interest, in any rule of the common law.' "]; *New York Central R.R. Co. v. White,* 243 U.S. 188, 198 (1917) ["No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit."]; *Ducharme v. Merrill-National Laboratories,* 574 F.2d 1307, 1309 (5th Cir.), *cert. denied,* 439 U.S. 1002 (1978) ["It is well settled that a plaintiff has no vested right in any tort claim for damages under state law."]; *Morris v. Hotel Riviera, Inc.,* 704 F.2d at 1114 ["[A]n individual has no vested interest in a common law rule."]; *Lamb v. Volkswagenwerk Aktiengesellschaft,* 631 F. Supp. 1144, 1149 (S.D. Fla. 1986) [party who was "merely pursuing a common law tort theory to recover damages" had no vested property right]; *see Hammond v. United States,* 786 F.2d 8, 12 (1st Cir. 1986) [rights in tort do not vest until a final judgment has been entered].

Since no one has a property interest in a common law tort claim, legislation which limits, or even abolishes, such a claim cannot violate the due process clause. *See, e.g., Duke Power Co.,* 438 U.S. at 88 [rejecting due process challenge to federal legislation limiting liability for nuclear accidents]; *Silver v. Silver,* 280 U.S. 117 (1929) [upholding abolition of guest-passenger's cause of action for negligence against host-driver]; *Carr v. United States,* 422 F.2d 1007 (4th Cir. 1970) [upholding legislation which abrogated federal employee's cause of action against fellow employee]; see *Brady v. Roosevelt Steamship Co.,* 317 U.S. 575 (1943) [recognizing congressional power to grant immunity from tort liability to private operators of government vessels].

The legislation at issue here, enacted seven years *before* the death of appellants' son, simply abrogated a court-

created rule which appellants would now like to invoke. The legislation reinstated the former, longstanding common law rule that servers of alcohol are not liable for injuries inflicted by the consumers of the alcohol. Appellants had no vested interest in the short-lived rule of liability entitling them to insist that it remain unchanged. Thus, the legislation abrogating that rule deprived appellants of neither life, liberty, nor property. The due process clause is inapplicable in this case.

B. Appellants' Irrebuttable Presumption Argument Rests On A Misreading Of The Statutes At Issue, Which Simply Confer Civil Immunity On A Defined Class Of Persons. The Statutes Contain No Presumptions Concerning Lack Of "Causation" Or Any Other Fact.

The irrebuttable presumption doctrine formed the basis for the ruling in a handful of cases decided by this Court more than a decade ago. *See Stanley v. Illinois,* 405 U.S. 645 (1972); *Vlandis v. Kline,* 412 U.S. 441 (1973); *United States Dep't of Agriculture v. Murry,* 413 U.S. 508 (1973); *Cleveland Bd. of Education v. LaFleur,* 414 U.S. 632 (1974). The Court relied on this doctrine to invalidate several legislative schemes which imposed a burden on persons in a defined class yet denied such persons an opportunity to show, as a factual matter, that they did not belong in the class.

In *Stanley,* for example, the Court invalidated a legislative scheme under which the state took custody of an illegitimate child following the death of the child's mother. *See Stanley,* 405 U.S. at 649, 656-58. The father of such a child was afforded no hearing on the question of his fitness as a parent. The Court held the legislation violated due process by conclusively presuming that all unmarried

fathers are unqualified to raise their children. Since this factual presumption is not true in all cases, the due process clause required the state to provide a hearing on the issue of parental fitness. *Id.*

In *Vlandis,* the Court struck down a college tuition system which imposed higher rates on nonresidents and conclusively presumed an applicant to be a nonresident if his legal address was outside the state at the time of application. *See Vlandis,* 412 U.S. at 452. Because the statutory presumption was "not necessarily or universally true in fact," due process required the state to allow the applicant "the opportunity to present evidence showing that he is a bona fide resident entitled to the in-state rates." *Id.*

Similarly, in *LaFleur,* the Court considered the rules of two school boards which required every pregnant teacher to take an unpaid leave of absence commencing five months and four months, respectively, before the expected birth of the child. The Court invalidated the rules under the due process clause because they conclusively presumed physical incapacity at a point during pregnancy when some teachers would not be incapacitated. *LaFleur,* 414 U.S. at 647-48. Like the factual presumption of unfitness in *Stanley* and nonresidency in *Vlandis,* the presumption of incapacity in *LaFleur* was "neither 'necessarily [nor] universally true.' " *Id.* at 646. The Court indicated that an individualized determination of incapacity would have satisfied the requirements of due process. *Id.* at 647 & n. 13.

The irrebuttable presumption cases "actually rest[ed] on an equal protection rationale, for the objectionable portion of each law was the way in which it classified individuals." 2 Rotunda, Nowak & Young, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 17.6, at 246 (1986) (footnote omitted). For this reason, the Court later

retreated from the irrebuttable presumption doctrine, limiting it to situations in which a state expressly purports to be concerned with a defined characteristic (parental fitness in *Stanley,* residency in *Vlandis,* physical incapacity in *LaFleur*) yet at the same time denies any opportunity for an individual to show factors bearing on that characteristic. *See Weinberger v. Salfi,* 422 U.S. 749, 767-74 (1975); *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 22-24 (1976); *Elkins v. Moreno,* 435 U.S. 647, 660 (1978); *United States v. Locke,* 471 U.S. 84, 103 (1985); *see also id.* at 110 (O'Connor, J., concurring) [questioning whether *Vlandis* has any force "beyond the facts underlying that case"].

Where legislation does not purport to be concerned with any particular characteristic but simply imposes a benefit or a burden on a defined group for a legitimate legislative purpose, the irrebuttable presumption doctrine is simply inapplicable. The appropriate framework for analysis is the equal protection clause, and the pertinent inquiry is whether, considering the legislative goal, the group has been defined arbitrarily or irrationally. *See Salfi,* 422 U.S. at 767-74; *Mourning v. Family Publications Service,* 411 U.S. 356, 377 (1973).

Appellants' effort to invoke the irrebuttable presumption doctrine in this case is fundamentally misguided. To begin with, appellants misread the statutes at issue. The statutes do not presume "the service of alcohol cannot cause injury to a third party," Jur. Stmt. at ii. On the contrary, the legislation expressly acknowledges service of alcohol *can* cause injuries to third parties—the legislation grants civil immunity "*for injuries inflicted* on that [third party]." Cal. Bus. & Prof. Code § 25602(b). The legislature granted civil immunity to servers of alcohol precisely *because* service of alcohol can and does cause injury to

third parties yet social policy dictates that such injury not give rise to civil liability.

Further, contrary to appellants' erroneous reading, the statutes they challenge do not even address the subject of "causation," much less presume anything about it. The statutes refer only to "proximate causation."[10] This distinction is important because, in California, "causation" is a matter of fact, while "proximate causation" is a matter of law. *See Valdez v. J.D. Diffenbaugh Co.*, 51 Cal. App.3d 494, 509, 124 Cal. Rptr. 467, 477 (1975) [proximate causation "is not a question of causation; it is simply a policy determination of whether or not the defendant should be held responsible for his acts"].

The rule that service of alcoholic beverages is not the proximate cause of injuries inflicted by the consumer originated in the common law. *See Lammers v. Pacific Electric Ry. Co.*, 186 Cal. 379, 384, 199 P. 523, 525 (1921); *Cole v. Rush*, 45 Cal.2d 345, 348, 289 P.2d 450, 452 (1955). The

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[10]California Business and Professions Code section 25602(c) states the legislature intended to abrogate the holdings in certain recent court decisions "in favor of prior judicial interpretation finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the *proximate cause* of injuries inflicted upon another by an intoxicated person." Cal. Bus. & Prof. Code § 25602(c) (West 1985) (emphasis added).

Likewise, Civil Code section 1714(b) merely declares the legislature's intent "to reinstate the prior judicial interpretation of this section as it relates to *proximate cause* for injuries incurred as a result of furnishing alcoholic beverages to an intoxicated person, namely that the furnishing of alcoholic beverages is not the *proximate cause* of injuries resulting from intoxication, but rather the consumption of alcoholic beverages is the *proximate cause* of injuries inflicted upon another by an intoxicated person." Cal. Civil Code § 1714(b) (West 1985) (emphasis added.

courts that announced this rule were not presuming anything but rather holding, as a matter of law, that servers of alcohol cannot be liable to third parties. In sections 25602(c) and 1714(b), the legislature simply endorsed those holdings, and abrogated more recent court decisions to the contrary. The statutes presume no facts.

In addition to misreading the statutes at issue, appellants fail to recognize that the irrebuttable presumption doctrine is inapplicable where, as here, there is no claim of legislative misclassification. Unlike the aggrieved parties in *Stanley, Vlandis,* and *LaFleur,* appellants identify no class in which they claim to have been wrongly included or excluded. Nor do appellants identify any presumed fact which, if rebutted, would place them in the narrow class of persons entitled to maintain tort actions against appellees.

Appellants assert the statutes conclusively presume "that the service of alcohol cannot cause injury to a third party." Jur. Stmt. at ii. Even if this reading of the statutes were correct (we have explained above why it is incorrect), rebuttal of the presumption would not benefit appellants in the least. Under section 25602(b), appellees' civil immunity does not depend on whether their conduct did or did not cause injury to appellants. Section 25602(b) states: "No person who sells . . . any alcoholic beverage pursuant to subdivision (a) of this section shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of the intoxication by the consumer of such alcoholic beverage." Cal. Bus. & Prof. Code §25602(b) (West 1985). Thus, the factual question whether appellees' conduct did or did not cause injury is immaterial; appellees are immune from

civil liability in either case. Unlike the aggrieved parties in *Stanley, Vlandis,* and *LaFleur,* appellants here could not possibly benefit from an opportunity to present additional facts.[11]

In summary, appellants' irrebuttable presumption argument rests on a gross misreading of the statutes in question. Contrary to appellants' assertion, those statutes contain no presumptions concerning lack of causation or any other fact. The statutes refer to "proximate causation," which is a matter of law not fact. Appellants do not claim to have been wrongly included in, or excluded from, any statutory class, nor do they identify any fact which, if rebutted, would enable them to maintain their action against appellees. The irrebuttable presumption doctrine is therefore inapplicable in this case. Appellants' argument to the contrary borders on the frivolous and does not merit this Court's attention.

—o—

CONCLUSION

For the foregoing reasons, appellees respectfully request that this Court summarily affirm the judgment of the Court of Appeal of California or, in the alternative, dismiss the appeal for want of a substantial federal question.

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[11]Appellants do not seek a hearing to prove that they have been wrongly excluded from the class of those entitled to maintain tort actions (obviously intoxicated minors and their victims). Rather, appellants challenge the legislature's decision to *define* that class as it did. Although appellants invoke the jargon of due process and irrebuttable presumptions, their claim is a garden variety equal protection challenge and should be analyzed accordingly.

Respectfully submitted,

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APPENDIX

SENATE COMMITTEE ON JUDICIARY

BACKGROUND INFORMATION

SB 1645

1. *Source*

(a) What group, organization, governmental agency, or other person, if any, requested the introduction of the bill? Please list the requestor's telephone number or, if unavailable, his address.

John Patrick Kearney, Pres., United Spirits Association, 596 No. Arrowhead Avenue, San Bernardino 92401 phone (714) 372-5519.

(b) Which groups, organizations, or governmental agencies have contacted you in support of, or in opposition to, your bill?

William M. Sheroff, Attorney, Claremont (714) 621-4935—opposes

(c) If a similar bill has been introduced at a previous session of the Legislature, what was its number and the year of its introduction?

AB 1990 & SB 1176 - 1977

2. *Purpose*

What problem or deficiency under existing law does the bill seek to remedy?

The California courts have recently interpreted existing law as imposing civil liability upon persons who sell, furnish, give or cause to be given alcoholic beverages to an intoxicated person when such person inflicts injury upon a third party. SB 1645 would specifically prohibit the imposition of civil liability in such instance.

See attached copy of press release

If you have any further background information or material relating to the bill, please enclose a copy of it or state where the information or material is available.

PLEASE COMPLETE THIS FORM AND RETURN IT TO THE SENATE COMMITTEE ON JUDICIARY, ROOM 2046 AS SOON AS POSSIBLE. THE COMMITTEE STAFF CANNOT SET THE BILL FOR A HEARING UNTIL THIS FORM HAS BEEN RETURNED.

From the office of
RUBEN S. AYALA
Senator, 32nd District
Room 2048
State Capitol

For Immediate Release

March 10, 1978

ALCOHOLIC BEVERAGE LIABILITY

Legislation has been introduced by Senator Ruben S. Ayala (D-Chino) to change the law dealing with alcoholic beverage liability, it was announced today.

"The California courts have recently interpreted existing law as imposing civil liability upon persons who sell, furnish, give or cause to be given alcoholic beverages to an intoxicated person when such person inflicts injury upon a third party," said Senator Ayala. "SB 1645 would specifically prohibit the imposition of civil liability in such instance. It would also state a legislative intent that prior judicial interpretation be reinstated so that such civil liability to a third party is incurred solely by the consumer of alcoholic beverages.

"I believe that every person is responsible for his or her willful acts and for any injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person," continued the Senator, "and I think it is time for the courts to recognize this."

END

SENATE DEMOCRATIC CAUCUS

SENATOR OMER L. RAINS, *Chairman*

Bill No. SB1645(As Amended:5-17-78)

Author: Ayala (D)

Subject: Alcoholic Beverage Liability: Proximate Cause

Policy Committee: Judiciary

Ayes (5) Beverly, Dennis Carpenter, Robbins, Deukmejian, Song

Noes (2) Sieroty, Wilson

Assembly Floor Vote: ——AYES ——NOES.

Summary of Legislation:

The California courts have recently interpreted existing law as imposing civil liability upon persons who sell, furnish, give or cause to be given alcoholic beverages to an intoxicated person when such person inflicts injury upon a third party.

This bill specifically prohibits the imposition of civil liability in such instances.

This bill also states a legislative declaration that prior judicial interpretation be reinstated so that such civil liability to any injured person or the estate of such person is incurred solely by the intoxicated person.

This bill also specifies that social hosts who furnish alcoholic beverages shall not be held legally accountable for damages by such person, or for injury to the property of, or death of, any third person, resulting from the consumption of such beverages.

Fiscal Effect:

None

Proponents:

United Spirits Association (sponsor)

San Pedro Chamber of Community Development and Commerce

California State University and Colleges Student Presidents Association

Bowling Properties Association of California

Veterans of Foreign Wars

Native Sons of the Golden West

American Legion

Tom Lazio Fish Company, Inc.

Moose Club

Opponents:

California Trial Lawyers Association

Arguments in Support:

Proponents argue that a person who drinks should be responsible for his or her willful acts. They also argue that recent court decisions making furnishers civilly liable have caused insurance premiums for tavern owners to skyrocket.

Arguments in Opposition:

Opponents argue that a furnisher's liability will cause him/her to be more careful in serving drinks to obviously intoxicated persons and thus promote the public safety.

Senate Bill 1645—An act to amend Section 25602 of the Business and Professions Code, and to amend Section 1714 of the Civil Code, relating to proximate cause.

Bill read third time.

The roll was called and the bill passed by the following vote:

AYES (27)—Senators Alquist, Ayala, Behr, Beverly, Campbell, Dennis Carpenter, Paul Carpenter, Cusanovich, Deukmejian, Dills, Dunlap, Foran, Garamendi, Greene, Marks, Mills, Nimmo, Presley, Rains, Richardson, Roberti, Rodda, Russell, Smith, Song, Stull, and Zenovich.

NOES (5)—Senators Gregorio, Hohndahl, Sieroty, Stiern, and Wilson.

Bill ordered transmitted to the Assembly.

5-24-78 *p. 11166*

SENATE COMMITTEE ON JUDICIARY
1977-78 REGULAR SESSION

SB 1645 (Ayala) S
As introduced B
Civil, Business & Professions Code —

DRAMSHOP ACT 1
—LIABILITY OF FURNISHERS OF LIQUOR— 6
4
5

HISTORY

Source: United Spirits Assn.
Prior Legislation: None
Support: Unknown
Opposition: Individuals, C.T.L.A.

PURPOSE

Under Business & Professions Code Section 25602 it is a misdemeanor for a person to sell, furnish or give away any alcoholic beverage to any obviously intoxicated person. Case law has made a violation of this provision the basis of civil liability for injuries caused to a third person by the intoxicated person.

This bill would exempt all furnishers of liquor from civil liability for injuries caused to a third person by an intoxicated person. It would also specifically abrogate existing judicial interpretations of the Dramshop Act.

The purpose of the bill is to exempt liquor sellers and furnishers from third party liability.

COMMENT

1. *Statement of legislative intent*

In *Vesely v. Sager* (1971) 5 C. 3d 153, the California Supreme Court stated that Section 25602 of the Busi-

ness & Professions Code (the dramshop provision) was enacted "for the purpose of protecting members of the general public from injuries to person and danger to property resulting from excessive use of intoxicating liquor."

SB 1645 would state the legislative intent that Section 25602 be interpreted to abrogate holdings in *Vesely* and *Bernhardt v. Harrah's Club* (1976) 16 C 3d 313 and to reinstate prior judicial interpretations of that section which found that it is the consumption, not the furnishing, of liquor which is the *proximate cause* of the alleged injuries to third persons.

HOW WOULD THE BILL AFFECT CASES WHICH ARE PRESENTLY IN LITIGATION AND ARE NOT DECIDED BEFORE JANUARY 1, 1979, AND CAUSES OF ACTION ARISING BEFORE THAT DATE?

2. *Exemption of liquor furnishers/sellers*

Violations of current Section 25602 have been successfully used by injured parties to recover from tavern owners or other persons who furnish liquors to the persons who caused such injuries. [*Vesely v. Sager, supra,* tavern owner liable; *Bernhardt v. Harrah's Club* (1976) 16 C 3d 313, Nevada tavern owner liable; *Brockett v. Kitchen Boyd Motor Co.* (1972 24 C 3d 87, employer who knowingly made liquor available to intoxicated minor liable; *Walters v. Sloan* (1975) 122 Cal. Rptr. 623, resident owner and daughter who furnished liquor to unsupervised minors liable.]

This bill would specifically prohibit the imposition of civil liability upon such persons, and would specify that the consumption, not the furnishing of liquors to a person would be the proximate cause of the injuries sustained by a third person.

Until *Vesely,* the latter doctrine was case law in California (Cf. *Cole v. Rush* (1955) 45 C. 2d 345 and *Fleckner v. Dionne* (1949) 94 C.A. 2d 246). In the *Cole* and *Fleckner* cases, the courts held that no lia-

bility on the part of the liquor furnisher existed because for a competent person it is the *voluntary* consumption, not the sale or gift, of intoxicating liquor which is the proximate cause of injury from its use.

However, in several cases before Vesely, the courts suggested that the *Fleckner* and *Cole* cases were based on "outmoded reasoning" and might be "ripe for disapproval." Thus, in *Thomas v. Bruza* (1957) 151 C.A. 2d, the court recognized that a bar keeper, like a restaurateur or other person whose premises are open to the public, owes a duty to invitees to exercise reasonable care in maintaining order for their safety. Thus, if liquor is knowingly furnished to a person dangerous when drunk, and the latter injures a peaceful guest, an action will lie.

Vesely and *Bernhardt* are extensions of the court's logic in *Thomas v. Bruza.*

3. *No effect on non-liability to intoxicated persons*

This bill would not affect existing case law which has generally denied the intoxicated person and/or his heirs any recovery against a person in violation of Section 25602 (Cf. *Cooper v. National R.R. Passenger Corp.* (1975) 45 C.A. 3d 389; *Carlisle v. Kanaywer* (1972) 24 C.A. 3d 587; and *Venzor v. Santa Barbara Elks Lodge, No. 613* (1976) 56 C.A. 3d 209).

4. *Conflicting approach*

SB 1175 (Foran) would create the statutory liability of licensed furnishers of liquor, and restrict that liability with a 1-year statute of limitations and a provision that the intoxicated person had no cause of action. It would also exempt from liability the non-licensed furnisher of liquor. The bill is currently in the Assembly Judiciary Committee.

5. *Rising insurance costs*

The application of Section 26502 in civil cases has caused insurance premiums to skyrocket, according to one proponent from $35,000/year to $160,000/year for tavern owners.

POSITIONS As of Original Version

SOURCE: United Spirits Association

SUPPORT: San Pedro Chamber of Community Development & Commerce; Calif. State Univ. & Coll. Student Presidents Assn.; Tom Lazio Fish Co., Inc.

OPPOSED: C.T.L.A.; Dept. of Alcoholic Beverage Control

DATE TYPED: 5-17-78

BILL NUMBERED: SB 1645

AUTHOR: Ayala, etal

AMENDED COPY: 5-17-78

Committee Votes: Senate Floor Vote:

COMMITTEE: JUDICIARY

BILL NUMBER: SB 1645
Date of Hearing: 5-9-78

Senators:	AYE	NO
Beverly	✓	
D. Carpenter	✓	
Robbins	✓	
Roberti		
Sieroty		✓
Wilson		✓
Zenovich		
Deukmejian (V.C.)	✓	
Song (Chairman)	✓	
Total	5	2

Assembly Floor Vote:

DIGEST

Provides that a person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic

beverage to an intoxicated person is not to be civilly liable to any injured person or the estate of such person as a result of intoxication by the consumer of such alcoholic beverage.

This bill also states a legislative intent that prior judicial interpretation be reinstated so that such civil liability to a third party is incurred solely by the intoxicated person.

Provides that no social host who furnishes alcoholic beverages to any person is to be held legally accountable for damages suffered by such person, or for injury to the person or property of, or death of, any third person, resulting from the consumption of such beverages.

FISCAL EFFECT:

Appropriation: No. Fiscal Committee: No. Local: No.

COMMENTS:

Under Business & Professions Code Section 25602 it is a misdemeanor for a person to sell, furnish or give away any alcoholic beverage to any obviously intoxicated person. Case law has made a violation of this provision on the basis of civil liability for injuries caused to a third person by the intoxicated person.

In *Vesely v. Sager* (1971), 5 C. 3d 153, the California Supreme Court stated that Section 25602 of the Business and Professions Code (the dramshop provision) was enacted "for the purpose of protecting members of the general public from injuries to persons and danger to property resulting from excessive use of intoxicating liquor."

Social hosts

The California Supreme Court just handed down its decision in the case of *Coulter v. Superior Court of San*

Mateo County (*Schwartz v. Reynolds & Co., real parties in interest*), on April 26, 1978. In that case the court concluded that a social host who furnishes alcoholic beverages to an obviously intoxicated person, under circumstances which create a reasonably foreseeable risk of harm to others, may be held legally accountable to those third persons who are injured when that harm occurs.

SB 1645 would state the legislative intent that Section 25602 be interpreted to abrogate holdings in *Vesely, Coulter* and *Bernhardt v. Harrah's Club* (1976) 16 C. 3d 313 and to reinstate prior judicial interpretations of that section which found that it is the consumption, not the furnishing, of liquor which is the *proximate cause* of the alleged injuries to third persons.

Exemption of liquor furnishers/sellers

Violations of current Section 25602 have been successfully used by injured parties to recover from tavern owners or other persons who furnish liquors to the persons who caused such injuries. (*Vesely v. Sager, supra,* tavern owner liability; *Bernhardt v. Harrah's Club* (1976) 16 C. 3d 313, Nevada tavern owner liable; *Brockett v. Kitchen Boyd Motor Co.* (1972) 14 C. 3d 87, employer who knowingly made liquor available to intoxicated minor liable; *Walters v. Sloan* (1975) 122 Cal. Rptr. 623, resident owner and daughter who furnished liquor to unsupervised minors liable; *Coulter v. Superior Court* (1978) 20 C. 3d ——, apartment owner who permitted service liquor to party guest liable).

Until *Vesely,* the latter doctrine was case law in California (Cf. *Cole v. Rush* (1955) 45 C. 2d 345 and *Fleckner v. Dionne* (1949) 94 C.A. 2d 246). In the *Cole* and *Fleck-*

ner cases, the courts held that no liability on the part of the liquor furnisher existed because for a competent person it is the *voluntary* consumption, not the sale or gift, of intoxicating liquor which is the proximate cause of injury from its use.

However, in several cases before Vesely, the courts suggested that the *Fleckner* and *Cole* cases were based on "outmoded reasoning" and might be "ripe for disapproval." Thus, in *Thomas v. Bruze* (1957) 151 C.A. 2d, the court recognized that a bar keeper, like a restaurateur or other person whose premises are open to the public, owes a duty to invitees to exercise reasonable care in maintaining order for their safety. Thus, if liquor is knowingly furnished to a person dangerous when drunk, and the latter injures a peaceful guest, an action will lie. *Vesely* and *Bernhardt* and *Coulter* are extensions of the court's logic in *Thomas v. Bruze.*

Rising insurance costs

The application of Section 26502 in civil cases has caused insurance premiums to skyrocket, according to one proponent from $35,000/year to $160,000/year for tavern owners.

Senate Coauthors: Behr, D. Carpenter, Greene and Russell

Assembly Coauthors: Lewis, Bane, Chimbole, Cline, Montoya, Statham, V. Thomas, Thurman, N. Waters and Wornum

UNITED SPIRITS ASSOCIATION
P.O. Box 1552, San Bernardino, CA 92401

(714) 884-3248

President: J. P. (Jack) Kearney
Vice-President: Don Knight

Secretary: A.M. (Al) Austi
Treasurer: Nena Negrete

April 7, 1978

Honorable Ruben S. Ayala
State Senator
Room 2048 State Capitol
Sacramento, California 95814

RE: SB 1645

Dear Ruben,

Thank you for sending me a copy of Shernoff's letter of March 15, 1978 in opposition to SB 1645. I will respond to his arguments in the order presented by him.

Shernoff states that *Vesely v. Sager* is a landmark case handled by Herb Hafif. He is correct that *Vesely* is a landmark case but that doesn't make it good law. It was a good case for Herb who will remember the adage, GOOD CASES MAKE BAD LAW. To learn that it was Herb's case only helps to explain the activity of the California Trial Lawyers in opposition to our efforts toward legislative repeal of *Vesely*. Herb Hafif is a former President of the C.T.L.A.

Shernoff correctly states that SB 1645 would immunize bartenders from civil liability for consequences of their conduct in serving obviously intoxicated persons. Prior to the *Vesely* case (1971) the law in California and in most other states held that liability for the consequences of intoxicated behavior was imposed on the drink-

er not the server of alcoholic beverages. The California Democratic Party expressed our position well by a Resolution passed in convention in Anaheim in December, 1977:

> WHEREAS the California Supreme Court has imposed civil liability for damages arising out of the actions of an intoxicated person upon the furnisher of alcoholic beverages, and
>
> WHEREAS those who abuse the use of alcohol should be responsible for their own intoxicated behavior, and
>
> WHEREAS the dilution of responsibility for intoxicated behavior will tend to encourage its abuse.
>
> NOW THEREFORE BE IT RESOLVED
> That the Democratic Party of the State of California believes that the drinker of alcoholic beverages, not the furnisher thereof, should be liable for negligent acts arising out of his abuse of alcohol, that it is opposed to Dram Shop Liability Law and supports legislative repeal of third party liquor liability.

SB 1645 will also immunize homeowners, employers and political and charitable organizations from civil liability for consequences of their conduct in serving obviously intoxicated persons.

Bartenders and waitresses are far less likely to serve drunks than untrained, unregulated homeowners or politicians. Every bartender and waitress knows that he is liable to a $500.00 fine and a six (6) month jail term for serving an obviously intoxicated person. He needs no additional civil liability for being his customer's keeper to encourage compliance with the criminal law.

The owners of restaurants and bars and liquor stores are regulated by the California Alcoholic Beverage Control and ABC Licensees know that they are subject to

fines, suspensions and, ultimately, revocation of their license if they or their employees serve intoxicated persons. They need not be subjected to law suits which are impossible to defend to motivate them to take care of their business investment.

Shernoff believes that, "Serving liquor is a privilege in this State." We submit that serving liquor is no more a privilege than selling ice cream, practicing law or engaging in any other business activity.

He suggests that insurance would not be available to take care of innocent victims of drunk drivers if your SB 1645 became law. His position is false. Insurance was available before the *Vesely* decision, it has been ever since and will continue to be after we have returned the civil responsibility for the abuse of alcohol back to the drinkers who abuse it. Where a drunk driver proximately causes injury to another his liability insurance carrier responds in damages. If the drunk driver is not insured the uninsured motorist and medical pay coverages on the victim's car apply. If neither driver is insured the injured party is eligible for benefits under the Victims of Violent Crimes Act.

The *Vesely* case does not fill a need for insurance. It only added a new class of persons liable for damages—new customers for insurance companies and new target defendants for plaintiff lawyers.

Shernoff wants you to believe that "the welfare system" must pay the damages for innocent victims "through medi-cal, etc." if your bill passes. His statement might startle those taxpayers who prefer to pay revenue to insurance companies than to their government but it has no factual basis.

Shernoff demonstrates a lack of awareness of an important, revenue-producing industry when he suggests that those "who wish to indulge . . . certainly have the obligation to pay a few more cents for their drinks." The vast majority of ABC Licensees are not buying Liquor Liability Insurance because the enormous and continually escalating insurance premiums are prohibitively expensive. Restaurateurs generally prefer the potential risk of losing their business later to going broke now.

You will remember the Pirates Den, a modest little dinner house (maximum seating 160 people) in San Bernadino. In 1974 their liability insurance premium was $300.00 per year. In 1975—$800.00. In 1976—$1,600.00. In 1977—$3,700.00. The coverage offered to them for the year 1978 imposed a premium of $7,364.00. They had to decline the coverage or fold their business.

The enormous insurance premiums grow directly from the essential unfairness of liquor liability law. When a citizen has an accident he reports it to his insurance company which promptly investigates the matter. An ABC Licensee or a Homeowner might be served with a lawsuit six (6) months or a year after an accident occurred and have no way of proving whether or not the drivers were in his place of business much less proving that the party was not obviously intoxicated. Insurance carriers have responded to this extraordinary risk by charging extraordinary insurance premiums.

To impose civil liability for the serving of alcoholic beverages is to create a class of citizens who cannot defend themselves. And that's about as un-American as you can get.

Cordially,
/s/ Jack

JOHN PATRICK KEARNEY
Legal Counsel

JPK/ct
cc: Assemblyman Bill McVittie
California Dining and Beverage Association
Assemblyman Jerry Lewis
California Bowling Proprietors Association

P.S.

In your letter of March 8, 1978 you asked if I could come to Sacramento to testify when your bill is set for hearing. I want to do so and if my trial calendar permits and if you give me notice I can probably make it, if not, another USA member will appear.

CALIFORNIA STATE UNIVERSITY AND
COLLEGES STUDENT PRESIDENTS ASSOCIATION

. . . representing 310,000 students statewide

(Letterhead Names omitted in printing)

August 28, 1978

The Honorable Edmund G. Brown, Jr.
Governor of California
State Capitol Building
Sacramento, CA 95814

Dear Governor Brown:

The Student Presidents Association supports SB 1645 (Ayala) and requests your signature on this bill.

Liquor liability is becoming an enormous problem for not only sororities and fraternities, but also for individual students. Liquor liability insurance is so incredibly expensive that students have no protection.

The only affect the current liability laws have is to make third parties unreasonably liable for another person's mistake.

Thank you for your consideration of our position.

Sincerely yours,

/s/ Craig A. Jones
Craig A. Jones
Legislative Advocate

cj/cbk

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San Francisco—1225
San Francisco—1471
San Jose—265
Stockton—276

September 12, 1978

Governor Edmund G. Brown, Jr.
State Capitol
First Floor
Sacramento, California 95814

Dear Governor Brown:

It has been called to the attention of the Amalgamated Transit Union that SB 1645 (Ayala) has been transmitted to you by the Legislature for further action. We respectfully urge you to sign this measure.

The Amalgamated Transit Union is comprised of approximately 10,000 bus drivers and maintenance employees

who work and reside throughout California. While the majority of our members work for public transit districts, we do represent a significant number of employees who work for private carriers transporting passengers on a charter basis. It is not unusual for charter companies to permit the serving of alcoholic beverages to passengers while a bus is in route to its destination. For some time now, ATU has been concerned about how recent cases such as *Vesely v. Sager* and *Bernhard v. Harrah's Club* might impact upon the serving of alcoholic beverages on charter bus trips. Under the above referenced cases, it is possible that a bus company could be joined as a defendant if an intoxicated passenger disembarked from a bus which permitted the serving of alcoholic beverages and that intoxicated passenger thereafter injured a third person. This joinder would seem to be allowed even if the bus line operator did not directly operate the bar, but only allowed one to be operated by the chartering party.

It is ATU's position that cases such as *Vesely* and *Bernhard* have extended the scope of potential liability beyond reasonable limits. ATU believes that SB 1645 rightfully places the responsibility for injuries proximately caused by an intoxicated person upon the party actually at fault—the intoxicated person. It is simply not equitable to permit the erosion of well-established liability principles simply for the sake of finding solvent defendants.

An additional factor in ATU's request that you sign SB 1645 is the potential financial hardship that would befall bus carriers if they were hit by huge judgements (which would be especially bitter in view of the attenuated basis of liability as discussed above). It is no secret that bus line operators, public and private alike, are finding it

increasingly difficult to offer service at rates which make bus travel an affordable option.

Thank you for considering ATU's views on this important issue.

Sincerely,

AMALGAMATED TRANSIT UNION
/s/ Jerry Long
Jerry Long

JL:sg

California Chamber
of Commerce
455 Capitol Mall
P.O. Box 1736
Sacramento, CA
95808
(916) 444-6670

August 31, 1978

The Honorable Edmund G. Brown, Jr.
Governor
State of California
State Capitol
Sacramento, Ca 95814

RE: *SB 1645 (Ayala et al)*
Liquor Liability

Dear Governor Brown:

The California Chamber of Commerce respectfully urges your approval of SB 1645 to exempt licensee, bartender, social host, etc. from civil liability in the event of injury to a third party. It would make the intoxicated person solely responsible for his own actions.

The Chamber has supported this legislation from the beginning at the strong urging from our membership and chambers of commerce whose liability insurance premiums have increased 400% and more in several years time for bar, hotel, and restaurant owners as well as non-profit organizations who sponsor social functions.

Existing Business and Professions Code 25602 still allows a cause of action as a misdemeanor against every person who sells, furnishes, or gives alcoholic beverage to any habitual or common drunkard or any obviously intoxicated person.

Thank you for your consideration of our views.

Sincerely,

/s/ John T. Hay
Executive Vice President

JTH/sw
cc/ Chamber's Statewide Insurance and Employee Benefits Committee
Chambers of Commerce
Assemblyman Ayala

A-25

INSURANCE AGENTS AND BROKERS
LEGISLATIVE COUNCIL

1127 11th Street - Suite 518 - Sacramento, California 95814
(916) 446-1428
Legislative Counsel
John A. Norwood

September 13, 1978

Honorable Edmund G. Brown, Jr.
State Capitol
Sacramento, California 95814

Governor Brown:

The Insurance Agents and Brokers Legislative Council, an association which represents 98% of the property and casualty insurance producers in California, urges your support and signature on SB 1645 (Ayala).

Many of the individuals most directly effected by this legislation are, like our members, small and medium-sized businessmen. It is these individuals who have a difficult time keeping the doors of their business open due to the high cost of liquor liability insurance. SB 1645 will provide these businessmen with the relief they need to ensure that they remain our clients on these and other matters and continue to serve their communities.

Your consideration of this matter is greately appreciated.

Sincerely,

/s/ John A. Norwood
John A. Norwood
Legislative Advocate

JAN:sbn

(SEAL)

(916) 322-9309

BRIAN L. WALKUP
Legislative Counsel

State of California
Department of Insurance

700 L Street, 3rd Floor
Sacramento, CA 95814

DRAM SHOP INSURANCE

ISO Monoline Experience (i.e., does not include package policies).

1975 Premiums—$6 million-nationwide
$366 thousand-California

California rates went up on the average 150% from 1974- to 1975.

1975—Rate Schedules:

	1975 to Present	*Pre 1975*
1. Clubs	47¢ per $100 annual receipts	19¢ per $100 annual receipts
2. Package Stores and Retail, consumed off premises	32¢ per $100 annual receipts	13¢ per $100 annual receipts
3. Restaurants, taverns, hotels, motels, consumed on premises	79¢ per $100 annual receipts	32¢ per $100 annual receipts
4. Manufacturers, Wholesalers, Distributors	8¢ per $100 annual receipts	3¢ per $100 annual receipts
5. Temporary Licensees	Flat Fee $40 per policy period	Same
6. Owners or lessees of premises owned by others	Flat Fee per policy $7.50 for bodily injury, $2.50 for Property damage	$5.00 bodily injury $2.00 property damage

CALIFORNIA LICENSED BEVERAGE ASSOCIATION

Latham Square Building
508 - 16th Street Telephone (415) 451-2377
Oakland, California 94612

August 31, 1978

The Honorable Edmund G. Brown, Jr.
Governor of the State of California
State Capitol
Sacramento, CA 95814

Dear Governor Brown:

We of the California Licensed Beverage Association, representing 40,000 members of the Restaurant, Tavern and Bowling associations, are asking you to sign Senate Bill 1645, so we can be relieved of the terrible insurance burden now resting on our shoulders, and forcing some of the smaller businessmen out of the industry due to the high cost of insurance coverage.

Insurance premiums have doubled and in some cases, tripled, making it impossible in some instances, for the owners of the establishments to carry insurance. Needless to say, the Association does not approve of the businesses being without insurance.

We would like to see you continue as Governor of the State of California, and we do thank you for past favors favorable to our industry. We really need your support of Senate Bill 1645 and will appreciate all you can do to help us in our endeavor.

Very truly yours,
/s/ Abe Harris
Abe Harris
Executive Secretary

AH:sp